

§ 655.670

20 CFR Ch. V (4–1–01 Edition)

(d) ETA, upon receipt of the Administrator's notice pursuant to paragraph (b) of this section:

(1) Shall, in the case of an attesting employer, suspend the employer's attestation, either in whole or in part, for the port or location at issue and for any other U.S. port, and shall not accept for filing any attestation submitted by the employer for a period of 12 months or for a shorter period if such is specified for that employer by the Attorney General; and

(2) Shall, if the Administrator's notice constitutes a conclusive determination (pursuant to § 655.670) that the prevailing practice at a particular U.S. port does not permit the use of alien crewmembers for the longshore activity(ies), thereafter accept no attestation under the prevailing practice exception on Form ETA 9033 from any employer for the performance of the activity(ies) at that port, and shall invalidate any current attestation under the prevailing practice exception on Form ETA 9033 for any employer for the performance of the activity(ies) at that port.

§ 655.670 Federal Register notice of determination of prevailing practice.

(a) Pursuant to § 655.625(b), the Administrator shall publish in the FEDERAL REGISTER a notice of the Administrator's determination of any investigation regarding the prevailing practice for the use of alien crewmembers for particular longshore activity(ies) in a particular U.S. port (whether under an attestation or under the automated vessel exception). Where the Administrator has determined that the prevailing practice in that U.S. port does not permit such use of alien crewmembers, and no timely request for a hearing is filed pursuant to § 655.630, the Administrator's determination shall be the conclusive determination for purposes of the Act and subparts F and G of this part; the Attorney General and ETA shall, upon notice from the Administrator, take the actions specified in § 655.665. Where the Administrator has determined that the prevailing practice in that U.S. port at the time of the investigation permits such use of alien crewmembers, the Administrator shall, in any subsequent inves-

tigation, give that determination appropriate weight, unless the determination is reversed in proceedings under § 655.630 or § 655.655.

(b) Where an interested party, pursuant to § 655.630, requests a hearing on the Administrator's determination, the Administrator shall, upon the issuance of the decision of the administrative law judge, publish in the FEDERAL REGISTER a notice of the judge's decision as to the prevailing practice for the longshore activity(ies) and U.S. port at issue, if the administrative law judge:

(1) Reversed the determination of the Administrator published in the FEDERAL REGISTER pursuant to paragraph (a) of this section; or

(2) Determines that the prevailing practice for the particular activity in the port does not permit the use of alien crewmembers.

(c) If the administrative law judge determines that the prevailing practice in that port does not permit such use of alien crewmembers, the judge's decision shall be the conclusive determination for purposes of the Act and subparts F and G of this part (unless and until reversed by the Secretary on discretionary review pursuant to § 655.655). The Attorney General and ETA shall upon notice from the Administrator, take the actions specified in § 655.665.

(d) In the event that the Secretary, upon discretionary review pursuant to § 655.655, issues a decision that reverses the administrative law judge on a matter on which the Administrator has published notices in the FEDERAL REGISTER pursuant to paragraphs (a) and (b) of this section, the Administrator shall publish in the FEDERAL REGISTER a notice of the Secretary's decision and shall notify the Attorney General and ETA.

(1) Where the Secretary reverses the administrative law judge and determines that, contrary to the judge's decision, the prevailing practice for the longshore activity(ies) in the U.S. port at issue does not permit the use of alien crewmembers, the Secretary's decision shall be the conclusive determination for purposes of the Act and subparts F and G of this part. Upon notice from the Administrator, the Attorney General and ETA shall take the actions specified in § 655.665.

(2) Where the Secretary reverses the administrative law judge and determines that, contrary to the judge's decision, the use of alien crewmembers is permitted by the prevailing practice for the longshore activity(ies) in the U.S. port at issue, the judge's decision shall no longer have the conclusive effect specified in paragraph (b) of this section. Upon notice from the Administrator, the Attorney General and ETA shall cease the actions specified in § 655.665.

§ 655.675 Non-applicability of the Equal Access to Justice Act.

A proceeding under subpart G of this part is not subject to the Equal Access to Justice Act, as amended, 5 U.S.C. 504. In such a proceeding, the administrative law judge shall have no authority to award attorney fees and/or other litigation expenses pursuant to the provisions of the Equal Access to Justice Act.

Subpart H—Labor Condition Applications and Requirements for Employers Using Non-immigrants on H-1B Visas In Specialty Occupations and as Fashion Models

SOURCE: 59 FR 65659, 65676, Dec. 20, 1994, unless otherwise noted.

§ 655.700 What statutory provisions govern the employment of H-1B nonimmigrants and how do employers apply for an H-1B visa?

(a) *Statutory provisions.* With respect to nonimmigrant workers entering the United States (U.S.) on H-1B visas, the Immigration and Nationality Act (INA), as amended, provides as follows:

(1) Establishes an annual ceiling (exclusive of spouses and children) on the number of foreign workers who may be issued H-1B visas—

- (i) 195,000 in fiscal year 2001;
- (ii) 195,000 in fiscal year 2002;
- (iii) 195,000 in fiscal year 2003; and
- (iv) 65,000 in each succeeding fiscal year;

(2) Defines the scope of eligible occupations for which nonimmigrants may be issued H-1B visas and specifies the qualifications that are required for entry as an H-1B nonimmigrant ;

(3) Requires an employer seeking to employ H-1B nonimmigrants to file a labor condition application (LCA) agreeing to various attestation requirements and have it certified by the Department of Labor (DOL) before a nonimmigrant may be provided H-1B status by the Immigration and Naturalization Service (INS); and

(4) Establishes an enforcement system under which DOL is authorized to determine whether an employer has engaged in misrepresentation or failed to meet a condition of the LCA, and is authorized to impose fines and penalties.

(b) *Procedure for obtaining an H-1B visa classification.* Before a non-immigrant may be admitted to work in a "specialty occupation" or as a fashion model of distinguished merit and ability in the United States under the H-1B visa classification, there are certain steps which must be followed:

(1) First, an employer shall submit to DOL, and obtain DOL certification of, a labor condition application (LCA). The requirements for obtaining a certified LCA are provided in this subpart. The LCA (Form ETA 9035) and cover page (Form ETA 9035CP, containing the full attestation statements that are incorporated by reference in Form ETA 9035) may be obtained from <http://ows.doleta.gov>, from DOL regional offices, and from the Employment and Training Administration (ETA) national office. Employers are encouraged to utilize the electronic filing system developed by ETA to expedite the certification process (see § 655.720).

(2) After obtaining DOL certification of an LCA, the employer may submit a nonimmigrant visa petition (INS Form I-129), together with the certified LCA, to INS, requesting H-1B classification for the foreign worker. The requirements concerning the submission of a petition to, and its processing by, INS are set forth in INS regulations. The INS petition (Form I-129) may be obtained from an INS district or area office.

(3) If INS approves the H-1B classification, the nonimmigrant then may apply for an H-1B visa abroad at a consular office of the Department of State. If the nonimmigrant is already in the United States in a status other than H-